

1 MANATT, PHELPS & PHILLIPS, LLP  
2 RONALD S. KATZ (California Bar No. 085713)  
3 E-mail: rkatz@manatt.com  
4 RYAN S. HILBERT (California Bar No. 210549)  
5 E-mail: rhilbert@manatt.com  
1001 Page Mill Road, Building 2  
Palo Alto, CA 94304-1006  
Telephone: (650) 812-1300  
Facsimile: (650) 213-0260

6 Attorneys for Defendant/Counterclaim and  
7 Third-Party Plaintiff Maritz Inc.

8 UNITED STATES DISTRICT COURT  
9  
10 NORTHERN DISTRICT  
11 SAN FRANCISCO DIVISION

12 VISA U.S.A. INC.,

13 Plaintiff/Counterclaim  
14 Defendant,

15 v.

16 MARITZ INC., d/b/a MARITZ  
17 LOYALTY MARKETING,

18 Defendant/Counterclaim  
19 and Third-Party Plaintiff,

20 v.

21 CARLSON MARKETING GROUP, INC.

22 Third-Party Defendant.  
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CIVIL ACTION NO. C 07-5585 JSW

RESPONSE OF DEFENDANT/  
COUNTERCLAIM PLAINTIFF MARITZ INC.  
TO VISA U.S.A. INC.'S EVIDENTIARY  
OBJECTIONS TO STEVE GALLANT  
DECLARATION

## INTRODUCTION

The evidentiary objections of plaintiff/counterclaim defendant Visa U.S.A. Inc. (“Visa”) to the Declaration of Steve Gallant of Maritz Inc. (“Maritz”) should be denied. Visa’s objections are meritless, and the statements in Mr. Gallant’s Declaration are relevant and proper.

Before addressing the specifics of Visa’s objections, some preliminary points are pertinent.

1. Mr. Gallant’s Declaration needs to be considered in light of all of the elements of Maritz’s fraudulent inducement claim. Visa tries to limit the relevance of particular statements in Mr. Gallant’s Declaration by focusing on only certain elements of Maritz’s fraudulent inducement claim.

2. The Gallant Declaration should also be considered in light of the facts that (a) this litigation is in the very early stages of the proceeding, (b) Maritz has not had been provided any discovery by Visa, (c) Visa’s key employees are unavailable to Maritz, and (d) Visa’s Motion to Stay the Action and to Compel Arbitration is akin in some respects to a preliminary injunction proceeding, and the Court therefore should apply a relaxed evidentiary standard. *See generally, Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984). As this Court observed in *Arthur J. Gallagher & Co. v. Edgewood Partners Ins. Center*, 2008 U.S. Dist. LEXIS 8924, \*7 n. 3 (N.D. Cal. 2008):

The parties have submitted multiple evidentiary objections. However, on an application for TRO or preliminary injunction, affidavits need not meet the standards set forth in Federal Rule of Evidence 56(e) or the Federal Rules of Evidence. *Bracco v. Lackner*, 462 F. Supp. 436, 442 (N.D. Cal. 1978); *see also Flynt Dist. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9<sup>th</sup> Cir. 1984) (district court may give inadmissible evidence some weight in consideration of a motion for preliminary injunction “when to do so serves the purpose of preventing irreparable harm before trial”). Therefore, the Court will not sustain any of the parties’ objections. Rather, the Court has given weight to the evidence presented based on the Court’s discretion, and upon consideration of the competence, personal knowledge and credibility of the affiants.

3. To the extent Visa’s objections suggest or indicate a need to “fill in the gaps” or to lay more of a foundation, such objections support Maritz’s position that Maritz should be

1 allowed to pursue discovery as set forth in Maritz's Brief Pursuant to Court Order dated  
2 January 17, 2008 and in Support of Discovery ("Maritz's Discovery Brief").

3 4. Many of Visa's objections go to the weight of the evidence rather than its  
4 admissibility.

5 5. Visa's objections also need to be considered in light of what Visa has not  
6 disputed. Visa argues, for example, that certain of Mr. Gallant's statements in his Declaration  
7 are not relevant because there is no evidence he communicated them to Visa. This argument  
8 misses the point. The statements could be relevant for any number of reasons, including to show  
9 Mr. Gallant and Maritz's state of mind, and/or that Maritz was acting reasonably in believing  
10 certain things based upon what Visa had and had not disclosed as well as based upon what Visa's  
11 conduct did or did not indicate. Moreover, regardless of whether Mr. Gallant communicated to  
12 Visa what he believed or understood, Maritz believes the evidence will show Visa was well  
13 aware of what it was doing, and that Visa was deliberately attempting to induce Maritz into  
14 agreeing to arbitrate before Maritz realized Visa was claiming Maritz owed tens of millions of  
15 dollars. Therefore, regardless of whether Mr. Gallant communicated his understanding to Visa,  
16 if Visa understood or believed Maritz did not realize what Visa would be claiming, and Visa  
17 deliberately concealed its intentions in order to take advantage of the situation, Visa acted  
18 improperly, especially in light of its obligation under the Master Services Agreement (the  
19 "MSA") to act in good faith in resolving disputes under the MSA. *See generally* Maritz's  
20 Discovery Brief; *see also* Maritz's Reply Brief Pursuant to Court Order Dated January 17, 2008  
21 and in Support of Discovery.

22 6. Visa's objections are contained in a filing captioned "Evidentiary Objections to  
23 the Declaration of Steve Gallant Filed in Support of Maritz, Inc.'s Opposition to Visa's Motion  
24 to Stay Action and to Compel Arbitration." Maritz's Declarations, however – all of which were  
25 filed on January 18, 2008 – relate not only to Maritz's Opposition to Visa's Motion to Stay but  
26 also to Maritz's January 18, 2008 Reply in Support of Maritz's Motion to Stay Arbitration  
27 Pending Determination of Arbitrability ("Maritz's Reply in Support of Motion to Stay") and  
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1 Maritz's Discovery Brief. Visa has not objected to Maritz's Declarations as they relate to  
2 Maritz's Reply in Support of Motion to Stay and/or Maritz's Discovery Brief.

3 **MARITZ'S SPECIFIC RESPONSES TO VISA'S OBJECTIONS**  
4 **TO STEVE GALLANT DECLARATION**

5 **1. Evidence to Which Visa Objects: Paragraph 4 (2:17-19):** "Since Visa was not  
6 terminating the Agreement based upon any alleged default or material breach but instead under  
7 Section XII.A.2(b), I considered Visa's termination to be a termination for convenience."

8 **Maritz's Response:** Mr. Gallant's statement is relevant and proper under F.R.E. 402 and  
9 701. Mr. Gallant's understanding with respect to Visa's termination of the agreement – i.e., that  
10 Visa's termination was not because of any alleged material breach or default of Maritz but rather  
11 for Visa's convenience – and the consequences of a termination for something other than breach  
12 or default – is both relevant and proper. His understanding is relevant in that, *inter alia*, it shows  
13 why he reasonably believed (a) Visa was not making claims against Maritz for breach of contract  
14 or default damages, much less claiming Maritz owed Visa tens of millions of dollars for such  
15 damages; (b) the only issue was how much Visa was going to pay of the \$5.2 million it owed to  
16 Maritz; and (c) why he was willing to agree to arbitrate. His statement also ties into his other  
17 testimony that he would not have agreed to arbitrate in the July 9 Letter had he known Visa was  
18 claiming entitlement to tens of millions of dollars.

19 Mr. Gallant's statement also has to be considered in light of the overall context of the  
20 fraud perpetrated by Visa. Maritz is entitled to show why (a) the information concealed by Visa  
21 was material, and (b) Mr. Gallant reasonably believed Visa was not and would not be making  
22 claims for tens of millions of dollars. Notably, Visa has not claimed it did not realize that Maritz  
23 was under a misimpression, and Maritz believes discovery will show Visa knew and took  
24 advantage of Maritz's misimpression by concealing Visa's true intentions in order to induce  
25 Maritz into agreeing to arbitrate. The issue is not limited to what Mr. Gallant told Visa about his  
26 understanding; the issues instead include what did Visa know, understand and/or believe, and  
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1 was Visa concealing information regarding its multi-million dollar claims in order to induce  
2 Maritz into agreeing to arbitrate.

3       **2. Evidence to Which Visa Objects: Paragraph 6 (2:24-26):** “I considered  
4 Ms. Buse’s “reservation of rights” language in her April 20 letter to be simply standard language  
5 to preserve Visa’s ability to object to the amount that Visa would have to pay to Maritz in light  
6 of Visa’s “for convenience” termination.”

7       **Maritz’s Response:** Mr. Gallant’s testimony is proper under FRE 402 and 701 and  
8 Visa’s objections should be overruled. Visa’s “best evidence” objection is meritless; Mr. Gallant  
9 is not purporting to “summarize” Ms. Buse’s letter. Mr. Gallant’s testimony as to his  
10 understanding is relevant for essentially the same reasons as in Maritz’s previous response. His  
11 testimony is also proper under Rule 701 in that it is rationally based on his perceptions and  
12 helpful to a clear understanding of his testimony and/or to the determination of a fact in issue  
13 with respect to Maritz’s fraudulent inducement claim.

14       **3. Evidence to Which Visa Objects: Paragraph 8 (3:3-8):** “Maritz’s May 7 letter  
15 contains a very brief reservation of rights sentence. Maritz anticipated, quite simply, that Visa  
16 might attempt to pare down the \$5.2 million that Visa owed, and Maritz therefore was simply  
17 reciprocally reserving its rights to the extent it might be relevant to do so. I thought that Visa  
18 might disagree, for example, with Maritz’s percentage completion estimates for partially  
19 completed Milestones and thus attempt to reduce the amount that Visa would have to pay  
20 Maritz.”

21       **Maritz’s Response:** Visa’s FRE 402 and 1002 relevance and best evidence objections  
22 should be denied for the same reasons as in the preceding paragraphs. First, Mr. Gallant is not  
23 purporting to “summarize” the May 7 letter. Second, Mr. Gallant is entitled to explain why  
24 Maritz’s May 7 letter includes a brief “reservation” sentence. Visa has suggested in an earlier  
25 filing that the reservation language in the May 7 letter is significant; Mr. Gallant therefore is  
26 entitled to explain why the sentence is in the letter. The evidence is also relevant because it  
27 supports Maritz’s position as to what it understood/believed at the time, which in turn ties into  
28

1 Maritz's claim that it acted reasonably under the circumstances in view of what Visa did – and  
2 more importantly did not – disclose.

3 **4. Evidence to Which Visa Objects: Paragraph 9 (3:9-17):** “Ms. Buse  
4 subsequently sent letters to Mr. Taylor dated June 5 and July 2, 2007 in which Ms. Buse again  
5 mentioned Visa's reservation of rights. As of those dates, I had no reason to believe that Visa  
6 was claiming that Maritz should pay it any money, much less the tens of millions of dollars that  
7 Mr. Thompson subsequently revealed on July 23, 2007. To my knowledge, no one from Visa  
8 had made any such claims to Maritz, and I am confident I would have been told had such claims  
9 been made. Such claims would also have been completely inconsistent with Visa's termination  
10 of the Agreement which was based on convenience rather than default and as such I considered  
11 the “reservation of rights” language to be redundant to that of the April 20 letter.”

12 **Maritz's Response:** Visa's objections should be overruled. The evidence is relevant  
13 under FRE 401 and 402 to show Mr. Gallant was acting reasonably in light of what he was and  
14 was not told. The evidence is also relevant regardless of whether Mr. Gallant “expressed” what  
15 he understood or believed to Visa. Visa could have been well aware, for example, that by  
16 concealing key information it was lulling Maritz into agreeing to arbitrate. If so, it does not  
17 matter whether Mr. Gallant told Visa what it already knew, i.e., that Maritz did not know or  
18 believe Visa was claiming Maritz owed tens of millions of dollars.

19 Similarly, Mr. Gallant's testimony that such claims by Visa would have been completely  
20 inconsistent with Visa's termination of the MSA for convenience is proper under FRE 701 and  
21 704 in that it is rationally based on Mr. Gallant's perception and is helpful to a clear  
22 understanding of his testimony and the determination of various facts in issue, including those  
23 pertaining to Maritz's belief and the reasonableness of Maritz's reliance based upon what Visa  
24 did and did not do and/or did or did not say.

25 Mr. Gallant's testimony also does not violate the best evidence rule. He is not purporting  
26 to summarize the language in the letters.

1           **5.     Evidence to Which Visa Objects: Paragraph 10 (3:18-27):** “On Monday,  
 2 June 18, 2007, Mark Peterman of Maritz told me that he had spoken with David Shepard of Visa  
 3 on Friday, June 15, 2007. According to Mr. Peterman, Mr. Shepard, Tad Fordyce and Tim  
 4 Attinger of Visa were available to meet with Maritz in mid-July 2007 to discuss Maritz’s  
 5 invoices, which was consistent with what I believed we were going to discuss with Visa. (I  
 6 understood that Mssrs. [sic] Fordyce, Attinger and Shepard all had leading roles for Visa in  
 7 connection with the Rewards Program project, as did Mr. Peterman for Maritz.) To my  
 8 knowledge no one from Visa told Mr. Peterman that Visa considered Maritz to be in default, or  
 9 that Visa was looking for any payment from Maritz, much less that Visa believed that Maritz  
 10 owed Visa tens of millions of dollars. If Visa had so informed Mr. Peterman, I would have been  
 11 informed.”

12           **Maritz’s Response:** The evidence is relevant and admissible under FRE 402, 406, 701,  
 13 704, 801(d)(2), 803(1) and (3), and 807. The evidence is relevant because it reflects Mr.  
 14 Gallant’s state of mind prior to July 9, 2007; shows the reasonableness of his belief as to what  
 15 was and was not in issue; and reflects the materiality of that which was not disclosed (i.e., the  
 16 difference between thinking that Visa was going to pay some but not all of the \$5.2 million it had  
 17 been billed and Visa instead claiming it was owed tens of millions of dollars).

18           Mr. Shepard’s statement to Mr. Peterman is not hearsay and is admissible under FRE  
 19 801(d)(2). Mr. Peterman’s statement to Mr. Gallant, in addition to being relevant to and  
 20 admissible for purposes of showing Mr. Gallant’s state of mind, is admissible under FRE 803(1)  
 21 or 807. Mr. Peterman has also provided a Declaration (filed on January 18, 2008) in which he  
 22 describes what he told Mr. Gallant, thereby corroborating Mr. Gallant’s statements and  
 23 eliminating the hearsay concern.

24           Mr. Gallant’s testimony that “to my knowledge no one from Visa told Mr. Peterman that  
 25 Visa considered Maritz to be in default” is not (as Visa contends) “impermissible speculation”; it  
 26 is fact.

27           Similarly, Mr. Gallant’s statement that “If Visa had so informed Mr. Peterman [i.e., that  
 28 Visa considered Maritz to be in default, or was looking for any payment from Maritz, much less

tens of millions of dollars], I would have been informed” is not “inadmissible speculation.” Mr. Gallant’s opinion is based on his position, duties and responsibilities at Maritz and his involvement in the Visa matter. *See* FRE 701; *cf.* FRE 406.

**6. Evidence to Which Visa Objects: Paragraph 13 (4:9-14):** “As of July 2, 2007, my belief and understanding was that we were going to negotiate how much of the \$5.2 million referenced in Mr. Taylor’s May 7 letter Maritz was entitled to receive from Visa pursuant to the termination for convenience portion of the Agreement. To my knowledge, as of July 2, 2007, Visa had not told Maritz that Visa considered Maritz to be in default, or that Visa expected Maritz to pay anything, much less that Visa would claim that Maritz owed tens of millions of dollars.”

**Maritz’s Response:** The evidence is relevant and admissible. Mr. Gallant’s statements are relevant to his state of mind and the reasonableness of his conduct in light of what Visa had done/said/indicated and/or had not done/said/indicated. As previously indicated, the issue is not limited to what Mr. Gallant communicated to Visa about his belief and understanding; instead, the issues include what Visa knew, understood and/or believed about what Maritz did or did not know.

**7. Evidence to Which Visa Objects: Paragraph 15 (4:16-23):** “Nothing that Mr. Thompson said to me suggested that Visa had or was making any claim for money from Maritz. Based on our conversations, I was led to believe that we were trying to devise a process for determining the amount of compensation that Maritz was owed by Visa under the Agreement in light of Visa’s termination for convenience.”

**Maritz’s Response:** Mr. Gallant’s statements are relevant and admissible. FRE 402, 701 and 704. Visa’s objections go to the weight, not the admissibility, of the evidence, and Visa can seek additional detail through discovery.

**8. Evidence to Which Visa Objects: Paragraph 16 (4:24-27):** “I believe it was reasonable for me to expect that, if Visa intended to make a default claim exceeding the amount of Maritz’s invoices by ten times or more and to resolve that claim in binding arbitration,

1 Mr. Thompson would tell me. He did not, nor to my knowledge did Visa convey any such  
2 information to anyone else at Maritz.”

3 **Maritz’s Response:** Mr. Gallant’s statements are relevant and admissible under FRE  
4 402, 701 and 704. His statements go directly to the question of whether Visa should have  
5 disclosed its multi-million dollar claims and the reasonableness of his conduct in believing Visa  
6 was not making such claims. Again, the issue is not limited to what Mr. Gallant told Mr.  
7 Thompson; the issues also include what Visa (including Mr. Thompson)  
8 knew/understood/believed about what Maritz did or did not know or realize.

9 **9. Evidence to Which Visa Objects: Paragraph 17 (5:1-9):** “I also knew that  
10 under Section XXII.A. of the Agreement, the parties were obligated to act in good faith and  
11 reasonably in resolving any disputes that arose under the Agreement (See Exhibit 2). More  
12 specifically, Section XXII.A. of the Agreement provides:

13 “DISPUTE RESOLUTION.

14 **A. Good Faith.** The Parties shall act in good faith and  
15 reasonably in interpreting this Agreement and the Related  
Agreements and resolving any disputes that arise thereunder.”

16 If Visa was claiming that Maritz owed it tens of millions of dollars, then Visa/Mr. Thompson  
17 should have disclosed this information before inducing me to agree to an arbitration.”

18 **Maritz’s Response:** Visa objects only to the third sentence (i.e., beginning “If Visa was  
19 claiming ....”). Mr. Gallant’s statement, however, is admissible under FRE 402, 701 and 704.  
20 Mr. Gallant is stating why he believes Visa and/or its counsel should have disclosed Visa’s multi-  
21 million dollar claims before inducing him into agreeing to arbitrate. His statement reflects both  
22 his state of mind, and the reasonableness of his belief and understanding, prior to his being  
23 induced into agreeing to arbitrate.

24 **10. Evidence to Which Visa Objects: Paragraph 20 (5:20-26):** “The agreement to  
25 arbitrate in the July 9 letter provides that the arbitration “will allow for only limited discovery”  
26 and that the hearing must be commenced within 90 days after the mediation process ends. I  
27 would never have agreed to such an expedited schedule or to limited discovery had Visa revealed  
28 that it would be seeking tens of millions of dollars from Maritz. I would not have been willing to

1 arbitrate under these conditions a default claim against Maritz for tens of millions of dollars  
 2 (which is a vastly different claim than one in which Maritz was seeking to recover \$5 million in  
 3 termination for convenience compensation).”

4 **Maritz’s Response:** Mr. Gallant’s testimony is not “inadmissible speculation,” as Visa  
 5 contends. His testimony is factual, is based on his experience and common sense, and is  
 6 admissible under FRE 402 and 701.

7 **11. Evidence to Which Visa Objects: Paragraph 21 (6:1-8):** “My objection all  
 8 along has been only with the agreement to arbitrate. Although Visa and Mr. Thompson had  
 9 misled Maritz and me, and their conduct raised serious questions in mind as to whether either  
 10 negotiations or mediation would be successful, Maritz and I nonetheless were still willing to  
 11 meet with Visa and also to attempt to mediate our differences, and Maritz in fact did meet with  
 12 Visa and did participate in the mediation. However, we were not and are not willing to give up  
 13 (among other things) Maritz’s right to a jury trial, Maritz’s right to conduct discovery that is  
 14 critical to getting to the bottom of Visa’s belatedly-revealed claims for tens of millions of dollars,  
 15 or to limit Maritz’s possible rights on appeal.”

16 **Maritz’s Response:** Mr. Gallant’s testimony is both relevant and admissible under FRE  
 17 402, 701 and 704. Visa’s arguments (at best) go to the weight, not the admissibility, of the  
 18 evidence.

19 His statement about his objection being “only with the agreement to arbitrate” is relevant  
 20 in light of the question of whether Maritz is contesting the validity of the entire July 9 Letter or  
 21 just the agreement to arbitrate contained in the July 9 Letter. His statement about being misled is  
 22 relevant because (among other things) it reflects Mr. Gallant’s state of mind and puts into  
 23 perspective his willingness to proceed with the negotiation and mediation aspects of the July 9  
 24 Letter but not the agreement to arbitrate. His testimony about what Maritz was and was not  
 25 willing to give up (e.g., the right to a jury trial and to conduct discovery) is relevant to Maritz’s  
 26 claim that the information concealed by Visa was material to the question of whether Maritz  
 27 would have agreed to arbitrate if Visa had disclosed its claim that Maritz owed tens of millions of  
 28 dollars.

12. **Evidence to Which Visa Objects: Paragraph 23 (6:11-28):** “More specifically, on Monday, July 23, 2007, I returned to the office after having been on vacation. That morning, I read the proposed “Alternative Dispute Resolution Protocol” that Mr. Thompson had sent me by letter dated July 19, 2007. The proposed Protocol stated that “Each Party claims the other should make a payment to resolve the dispute.” My immediate reaction was that the sentence was probably a mistake that resulted from a carry-over from a “form” protocol that Mr. Thompson or Visa had used in the past. Shortly thereafter, I met with Mark Peterman and Stu Vincent of Maritz, both of whom had been intimately involved in the Visa project. The purpose of the meeting with Mr. Peterman and Mr. Vincent (which had been previously scheduled) was to prepare for a meeting that had been scheduled in St. Louis with Visa or the next day, July 24, 2007, at which we were going to discuss the \$5.2 million that Visa owed as referenced in the May 7 letter. I showed Mssrs. Peterman and Vincent the sentence in the proposed Protocol and asked them if they knew of any claim by Visa that Maritz should pay Visa money to resolve the dispute. They told me that they did not. In fact, they told me that Mr. Peterman had spoken with Mr. Fordyce the previous Friday, July 20, 2007, and had discussed with him how the negotiations on July 24 would proceed, and that Fordyce had confirmed Peterman’s understanding and expectation that the purpose of the July 24 meeting was to cover Maritz’s invoices. Mr. Fordyce had said nothing, according to Mr. Peterman, about Visa having any claim that Maritz should pay money.”

**Maritz’s Response:** Mr. Gallant’s testimony is relevant and admissible under FRE 402 and 701. First, his testimony is relevant in that it shows neither he, Mr. Peterman nor Mr. Vincent were aware as of July 23, 2007 of any claim by Visa that Maritz should make a payment to Visa, and if there was no awareness of any such claim as of July 23, it follows there was also no such awareness as of July 9 when Visa sent the July 9 Letter containing the agreement to arbitrate.

Second, the evidence is further relevant because it shows how quickly Mr. Gallant reacted after he learned Visa was seeking a payment from Maritz, which in turn shows the materiality of Visa’s concealing its claim it was owed tens of millions of dollars.

1 Visa's hearsay objections should also be overruled. Fordyce's comments to Peterman are  
 2 not hearsay and are admissible under FRE 801(d)(2). In addition, even if Fordyce's comments  
 3 were hearsay, they should be admitted under either FRE 807 or in light of the lesser evidentiary  
 4 standard that should be in effect at this preliminary stage of the litigation (especially since  
 5 discovery has not yet begun).

6 Mr. Peterman's and/or Mr. Vincent's statements to Mr. Gallant about not being aware of  
 7 any claim by Visa that Maritz should pay Visa money to resolve the dispute are also admissible  
 8 on several grounds. First, they reflect Mr. Gallant's state of mind – i.e., that he did not know of  
 9 any claim by Visa that Maritz should pay money to resolve the dispute – as late as July 23. In  
 10 addition, these comments to Mr. Gallant are also admissible under FRE 803(3), FRE 807 and/or  
 11 in view of the lesser evidentiary standard that should apply at this preliminary stage of the  
 12 litigation.

13 Visa's hearsay objection as to Mr. Peterman's statements should also be overruled  
 14 because Maritz has also filed, on January 18, 2008, Mr. Peterman's Declaration with the Court in  
 15 which he describes what he told Mr. Gallant (see Peterman Decl. ¶ 2-5).

16 **13. Evidence to Which Visa Objects: Paragraph 25 (7:6-10):** "I essentially told  
 17 him that this was news to me and that I was very surprised. Mr. Thompson then claimed that our  
 18 business people had known about this for many months. I knew his statement was untrue, since  
 19 Mr. Peterman and Mr. Vincent of Maritz had told me less than two hours earlier that they did not  
 20 know that Visa was claiming that Maritz should pay Visa anything, much less that Maritz  
 21 supposedly owed Visa tens of millions of dollars."

22 **Maritz's Response:** Visa objects only to the third sentence, claiming it is argumentative  
 23 and irrelevant. To the contrary, it is admissible under FRE 402 and 701.

24 Mr. Gallant's comment is proper under FRE 701 because it is rationally based on his  
 25 perception and is helpful to a clear understanding of his testimony and/or to the determination of  
 26 a fact in issue. The evidence is relevant because, *inter alia*, (a) it shows a pattern of deceit and  
 27 duplicity on Visa's part, and (b) it ties into the next sentence in Mr. Gallant's Declaration in  
 28 which he explains his reaction upon realizing he had been duped and deceived. Mr. Gallant's

1 testimony may prove to be further relevant depending upon what Visa's documents and/or  
 2 witnesses reveal. If (for example) Visa's documents reflect that Visa (a) knew Maritz's business  
 3 people were not aware Visa was claiming entitlement to tens of millions of dollars and (b) was  
 4 using this lack of information to induce Maritz into agreeing to arbitrate, then Mr. Thompson's  
 5 role in Visa's misconduct will become even more central to the fraudulent inducement issue.

6 **14. Evidence to Which Visa Objects: Paragraph 26 (7:11-19):** "When  
 7 Mr. Thompson revealed that Visa was claiming that Maritz owed Visa tens of millions of dollars,  
 8 I was incensed and immediately felt as if we (i.e., Maritz and I) had been duped, deceived and  
 9 lied to. Although I may have indicated at the time that I was not "accusing" Mr. Thompson of  
 10 certain things, that was largely because accusing him at that point of fraud and improper conduct  
 11 would not have accomplished anything and probably would have led to some very harsh and  
 12 uncomplimentary things being said. Moreover, I wanted to try to keep the discussion on a  
 13 professional level and did not want my emotions to get the better of me. He had clearly deceived  
 14 me, but I did not want his deceitful conduct to result in my stooping to a similar level."

15 **Maritz's Response:** Mr. Gallant's statements are relevant, proper and admissible under  
 16 FRE 402 and 701. His testimony that he was incensed and felt as if he and Maritz had been  
 17 duped and deceived (among other things) (a) shows how strongly he felt that he had been  
 18 deceived, which in turn underscores the importance and materiality of the information Visa  
 19 concealed; and (b) is an opinion and inference rationally based on his perception and helpful to a  
 20 clear understanding of just how much importance he placed on the information that had been  
 21 withheld and whether or not he would have agreed to arbitrate had it been disclosed.

22 Mr. Gallant's testimony about why he did not immediately accuse Mr. Thompson of  
 23 certain things is relevant for several reasons. For example, Visa has attached significance to  
 24 Mr. Gallant's not immediately accusing Mr. Thompson of misconduct; Mr. Gallant is entitled to  
 25 explain why he did not do so. Second, Mr. Gallant's comments are not "argumentative"; they  
 26 are factual and explain why he refrained from making some very pointed comments to  
 27 Mr. Thompson.  
 28

1           **15.    Evidence to Which Visa Objects: Paragraph 29 (8:1-10):** “I believe I had a  
 2 right to expect that Mr. Thompson and Visa were acting in good faith; indeed, Visa was  
 3 obligated to do so under Section XXILA of the Agreement (See paragraph 17 above). It is now  
 4 apparent they were not doing so. With the benefit of 20/20 hindsight, I can see how  
 5 Mr. Thompson and Visa set things up. Visa indicated both to Maritz’s business people and me  
 6 that, upon the completion of the transition from Maritz to Carlson, we would meet to discuss  
 7 Maritz’s invoices containing the amounts that Visa owed to Maritz. Visa never indicated in  
 8 connection with these conversations or communications that it was claiming that Maritz was in  
 9 default, or that Visa was entitled to any payment from Maritz, much less a payment of tens of  
 10 millions of dollars. Nor did Mr. Thompson say anything to me about it, until two weeks after I  
 11 had signed the July 9 letter containing the agreement to arbitrate.”

12           **Maritz’s Response:** Mr. Gallant’s testimony is relevant, proper and admissible under  
 13 FRE 402, 701 and 704. His statements are relevant in that they relate to the reasonableness of  
 14 his belief based on what Visa did and did not disclose, say and/or indicate. His opinions and  
 15 inferences are rationally based on his perception and are helpful to a clear understanding of his  
 16 testimony and also to the determination of one or more facts in issue (e.g., whether Visa misled  
 17 Maritz – including through partial, incomplete or misleading actions, conduct and/or statements,  
 18 through half-truths, etc.).

19           Visa also objects on foundational and “conclusory” grounds regarding the fourth sentence  
 20 of paragraph 29 of Mr. Gallant’s Declaration. There is no requirement, however, that paragraph  
 21 29 contain the detail that Visa seems to request. Visa’s objections go to the weight rather than  
 22 the admissibility of the evidence, especially in light of the lesser evidentiary standard that should  
 23 apply at this preliminary stage of the litigation.

24           **16.    Evidence to Which Visa Objects: Paragraph 31 (8:25-9:10):** “On August 16,  
 25 Mr. Weiss and I had a telephone call with Mr. Thompson wherein we discussed proceeding with  
 26 negotiation and mediation. Mr. Thompson, as he had in several other telephone conversations  
 27 with me, began to discuss the dispute over the arbitration issue, but since I had made it clear in  
 28 several telephone conversations that Maritz objected to the arbitration, I told Mr. Thompson that

1 since both of us recognize that we have a disagreement over the arbitration, let us agree to  
 2 disagree on this issue and use our time to plan the negotiation and mediation. We then discussed  
 3 proceeding with the negotiation and possible dates and places and also proceeding with a  
 4 mediation if the negotiation was not successful. Mr. Thompson expressed some reluctance in  
 5 going forward, noting that he had engaged in such negotiations in the past only to learn that  
 6 during the negotiation process the other party surprised him by filing suit. We discussed whether  
 7 the parties could resolve that concern by simply agreeing to some type of agreement wherein the  
 8 parties would agree not to file suit while the negotiation and mediation were going on. He said  
 9 he would think about it. Maritz made it clear that it was willing to proceed with the negotiation  
 10 and mediation but not the arbitration.”

11 **Maritz’s Response:** Visa’s objection to the “entire paragraph” on the ground it is  
 12 “impermissibly vague” should be overruled. Paragraph 31 of Mr. Gallant’s Declaration provides  
 13 ample detail; nothing more is required.

14 Visa’s objection on FRE 402 grounds to the discussion “regarding filing suit” should  
 15 similarly be overruled. The discussion tied directly into the discussions about negotiating,  
 16 mediating and/or arbitrating, which in turn tie into the fact that Maritz was willing to negotiate  
 17 and mediate and was objecting only to having to arbitrate. (Visa’s objection to this part of the  
 18 conversation is also inconsistent with its other objection that the “entire paragraph” is too  
 19 vague.).

20 **17. Evidence to Which Visa Objects: Paragraph 33 (9:16-24):** “The attached e-  
 21 mail from Mr. Thompson to Mr. Weiss and me dated August 21, 2007 (attached hereto as  
 22 Exhibit 6) makes it clear that Maritz agreed that it was willing to proceed with the first two  
 23 stages of the dispute resolution process outlined in the July 9 letter agreement, namely  
 24 negotiation and mediation, but reserved its position on arbitration. Contrary to what Mr.  
 25 Thompson described in the first sentence of the e-mail, it was not Maritz’s position that the July  
 26 9, 2000 letter agreement as a whole was unenforceable, but only that the arbitration provision in  
 27 the letter was unenforceable. As acknowledged by Mr. Thompson in the following sentences of  
 28

1 his e-mail, Maritz had said it was willing to proceed with negotiation and mediation but not with  
2 arbitration.”

3 **Maritz’s Response:** Mr. Gallant’s statements are proper and admissible. He is entitled  
4 to highlight the significant aspect of the referenced email as it pertains to the issues in dispute,  
5 and his statements are proper under FRE 701. He is also entitled to note his disagreement with  
6 Mr. Thompson’s statement in the first sentence of the email. There is no “best evidence”  
7 problem because the referenced August 21, 2007 email was attached to Mr. Gallant’s  
8 Declaration.

9 **18. Evidence to Which Visa Objects: Paragraph 35 (10:3-7):** “Thus, contrary to  
10 the assertions of Visa’s response to Maritz’s motion to stay arbitration, I consistently and  
11 continually, from the first time that Mr. Thompson disclosed to me that Visa had claims of tens  
12 of millions of dollars and sought money from Maritz, made it clear to Mr. Thompson that Maritz  
13 had no issue with the negotiation and mediation steps outlined in the July 9 letter, but Maritz  
14 objected to and did not believe that the arbitration provision was valid.”

15 **Maritz’s Response:** Mr. Gallant’s testimony is proper under FRE 701 and 704.

16 **19. Evidence to Which Visa Objects: Paragraph 36 (10:8-12:18):** “At least  
17 several other background facts are important in attempting to put things into perspective.

18 a. I knew that Maritz and Visa had agreed in January or February of 2007 to a  
19 new target launch date of early July 2007. No one had ever told or indicated to me that  
20 liquidated damages of any amount were or somehow would be accruing during that  
21 timeframe and I am confident I would have been told if a claim for liquidated damages  
22 had been made against Maritz. In addition, if Maritz had known that Visa would be  
23 claiming that liquidated damages were accruing, it is inconceivable to me that Maritz  
24 would have agreed to postpone the launch date for such a lengthy period of time without  
25 first reaching agreement with respect to the liquidated damages. The first time that I  
26 heard that Visa was claiming that liquidated damages had been accruing for many months  
27 was on July 23 or 24, 2007, when Mr. Thompson said it.”  
28

1           b. I understood in approximately March or April 2007 (prior to Visa's April  
2           20, 2007 termination notice) that Maritz and Visa had been discussing one or more other  
3           possible joint business opportunities. Such discussions would have been inconsistent with  
4           the notion that Visa was seeking tens of millions of dollars in damages from Maritz.

5           c. Visa was terminating the Agreement for convenience rather than based  
6           upon any alleged default or material breach. Had Visa been seeking to terminate due to an  
7           alleged material breach, Visa would have been obligated to give Maritz notice and an  
8           opportunity to cure, which Visa had not done. Therefore, it did not occur to me that Visa  
9           would be seeking damages as if it were terminating for a default or material breach since  
10          that was not the basis for the termination.

11          d. As Mr. Thompson is well aware, my objection has always been that he  
12          misled me into agreeing to arbitrate. . . . My complaint is and has been that we (Maritz)  
13          were fraudulently induced into agreeing to arbitrate.

14          e. Indeed, both Maritz and I were still willing to meet on July 24, 2007 – the  
15          day after Mr. Thompson revealed his multi-million dollar surprise. Both I and Charlie  
16          Weiss (Maritz's outside counsel who became involved after Mr. Thompson revealed  
17          Visa's claims) repeatedly made clear to Mr. Thompson in August 2007 that Maritz was  
18          willing to meet and also to mediate, but that Maritz was not obligated to arbitrate.

19          f. Although my July 23, 2007 email to Mr. Thompson is not worded as  
20          artfully as in retrospect I would have preferred, my reference to "our previous agreement"  
21          was directed to the agreement to arbitrate.

22          g. Similarly, my August 8, 2007 email to Mr. Thompson focuses on the  
23          agreement "to arbitrate." The last sentence in the third paragraph of that email again  
24          reflects that the arbitration aspect was the issue in dispute. My reference to the  
25          "agreement to mediate" in the previous sentence of the email merely reflects somewhat  
26          loose language on my part. As previously stated, both I and Maritz's outside counsel,  
27          Charlie Weiss, made very clear to Mr. Thompson in August 2007 that Maritz was willing  
28          to mediate and that Maritz's concerns tied to the arbitration agreement.

1           h.       In my email to Mr. Thompson dated August 22, 2007 at 9:17 a.m., I state at  
2       the end of the email that “[a]lthough I suppose it goes without saying, we do disagree with  
3       your view of the binding effect of the letter you attached. I have typed these thoughts  
4       quickly so I apologize if they are incomplete but there are merely meant to be a thought  
5       starter for our conversation.” As indicated, I had typed my thoughts quickly and therefore  
6       noted specifically that they might be incomplete. The “binding effect of the letter”  
7       mentioned in my August 22 email pertains only to the arbitration. As the rest of my email  
8       reflects, and as Mr. Thompson was told a number of times by Mr. Weiss and me, Maritz  
9       was willing to participate in the business meeting/negotiations and the mediation as set  
10      forth in the July 9 letter. In fact, by early September of 2007, the parties had agreed that  
11      the business meeting and mediation would take place and were working to secure dates,  
12      locations and a mediator.

13           i.       In my mind there was a clear distinction between the business negotiations  
14      and the mediation on the one hand, and the arbitration on the other. Only the arbitration  
15      could result in a unilaterally-imposed binding decision. The other two required a mutual  
16      agreement between the parties. Despite Visa’s duplicity, we were willing to proceed with  
17      the informal efforts to resolve the parties’ disputes. We were not willing, however, to  
18      give up our rights to a jury trial, to conduct full discovery, etc., in connection with an  
19      arbitration.

20           j.       I never agreed that any claim as to whether Visa had fraudulently induced  
21      Maritz into arbitrating could be decided by an arbitrator. I had no idea that Maritz had  
22      such a claim, since I also had no idea that Mr. Thompson and Visa had been concealing  
23      that it planned to seek tens of millions of dollars from Maritz.”

24      **Maritz’s Response:** Visa’s objections to Paragraph 36(a) of the Gallant Declaration  
25      should be overruled; Mr. Gallant’s testimony is relevant and admissible under FRE 402 and 701.

26           There is no need for Mr. Gallant’s Declaration to state how he knew of the new target  
27      date of early July 2007; what he knew/understood is the key issue for purposes of his mental  
28      state, not how he learned it.

1 Similarly, his testimony that it is inconceivable to him that Maritz would agree to  
 2 postpone the launch date for such an extended period if Maritz had known that Visa would be  
 3 claiming that liquidated damages were accruing is proper because it is (1) relevant to showing  
 4 his state of mind as to what was and was not in issue prior to signing the July 9 Letter; and (2)  
 5 proper under FRE 701. In addition, Mr. Gallant's testimony in paragraph 36(a) is relevant  
 6 regardless of whether he told it to Visa before July 9.

7 Visa's objections to Paragraph 36(b) of Mr. Gallant's Declaration should also be  
 8 overruled. There is no requirement that Mr. Gallant's Declaration contain any additional detail,  
 9 especially at this stage of the proceeding. The additional detail can be obtained through  
 10 discovery. Mr. Gallant's testimony in Paragraph 36(b) is proper under FRE 701.

11 Visa's objections to Paragraph 36(c) are also meritless. Mr. Gallant's testimony is proper  
 12 under FRE 701 and, among other things, is relevant to his state of mind and the reasonableness  
 13 of his beliefs prior to July 9, 2007, as well as to the materiality of the mega-million dollar  
 14 damage information Visa concealed – all of which are relevant to the fraudulent inducement  
 15 claim. And, as previously noted, this holds true regardless of whether Mr. Gallant told Mr.  
 16 Thompson of his belief.

17 Mr. Gallant's statements in Paragraph 36(d) of his Declaration to which Visa objects are  
 18 proper under FRE 402 and 701. Mr. Gallant's comment about Mr. Thompson being "well  
 19 aware" that Mr. Gallant's objection "has always been that he misled me into agreeing to  
 20 arbitrate" is proper under FRE 701 and is relevant in light of Visa's incorrect claim that Maritz is  
 21 challenging the entire July 9 Letter rather than just the agreement to arbitrate contained therein.  
 22 Mr. Gallant certainly can testify that Mr. Thompson was aware of Maritz's position since Mr.  
 23 Gallant was the person making Mr. Thompson aware of it.

24 Visa also objects generally to Paragraphs 36(e)-(j), claiming they are "argumentative"  
 25 and "contain no admissible evidence." Visa's objections are meritless and should be denied.

26 **20. Evidence to Which Visa Objects: Paragraph 37 (12:19-24):** "Notwithstanding  
 27 the discussion with Mr. Thompson in mid-August of 2007 that the parties could enter into an  
 28 agreement in which the parties would agree not to file suit, Visa unexpectedly filed suit against

1 Maritz in federal court in California on Friday, November 2, 2007 and commenced arbitration  
2 proceedings against Maritz in California that same day, just five days before the parties'  
3 mediation was scheduled to commence the following Wednesday, November 7, 2007.”

4 **Maritz's Response:** Visa objects to Paragraph 37 of Mr. Gallant's Declaration on  
5 relevance grounds. However, Visa's filing of this lawsuit and the related arbitration provide  
6 further evidence that Visa has not acted in good faith in attempting to resolve disputes under the  
7 MSA.

8 Dated: February 19, 2008

MANATT, PHELPS & PHILLIPS, LLP

9 By: /s/ Ryan S. Hilbert

10 Ronald S. Katz (SBN 085713)

11 Ryan S. Hilbert (SBN 210549)

MANATT, PHELPS & PHILLIPS, LLP

12 1001 Page Mill Road, Building 2

Palo Alto, CA 94304-1006

13 Telephone: (650) 812-1300

14 Facsimile: (650) 213-0260

*Attorneys for Defendant and Counter-Claimant*  
MARITZ INC.